IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO.193 OF 1999

Mrs. Madhavi Dilip
Kapileshwarker, married,
Teacher, Shri Saraswati
Dnyan Prasarak Saunstha,
(Primary Section),r/o
Kapileshwari, P.O. Kavale,
Ponda, Goa. ... Petitioner

Versus

1. State of Goa, through
the Secretary Education,
with its office at
Secretariat, Director of
Education, Government of
Goa, Directorate of
Education, St. Inez, Panaji,
Goa,

2. The Director of Education,
Government of Goa,
Directorate of Education,
St. Inez, Panaji, Goa,

3. The Asstt. Director of
Education, Directorate of
Education, St. Inez,
Panaji, Goa,

4. Shri Saraswati Dnyan
Prasarak Saunstha,
a Society registered
under the Societies
Registration Act, 1860,
with its ffice at Kavlem,
Ponda, Goa and

5. Mrs. Sushma K.S.
Talaulikar, 393 (B),
Talaulim, Ponda, Goa. ... Respondents.

Shri S. D. Lotlikar, Senior Advocate with Shri A. D. Bhobe, advocate for the petitioner.

Shri N. K. Sawaikar, advocate for respondent nos. 1 to 3.

Shri S. G. Bhobe, advocate for respondent no.4.

CORAM : F. I. REBELLO &
P. V. HARDAS, JJ.

DATE : 18th June, 2003.

ORAL JUDGMENT (Per Rebello, J.)

A post of Primary Teacher was sanctioned in the School run by respondent no.4. Respondent no.3 in the communication of 21st August, 1997, apart from communicating the sanction of the post on account of increase in students' strength permitted the School to fill in the post by the usual procedure of direct recruitment and by giving preference to the surplus/retrenched teachers. The post was then advertised. The petitioner herein was one of the applicants. In the interview held the petitioner was selected. The petitioner at the relevant time had qualifications of S.S.C. as also Diploma in Education (D.Ed.). The petitioner's name was also registered with the local Employment Exchange. Vide letter of 3rd November, 1997, the petitioner was informed by the fourth respondent that she had been selected as Primary Section (Marathi) Teacher, against the permanent post which had been created with effect from 10th November, 1997. The petitioner was also informed that the petitioner would be on probation initially for a period of two years. The other conditions need not be adverted to. The petitioner by letter of 7th November, 1997, accepted the appointment. It may also be relevant to note that the petitioner was working in the very school in the Pre-primary Section, since 1994. The petitioner joined duties in the Primary Section on 10th November, 1997 and started discharging her functions as Primary Teacher.

2. The fourth respondent vide communication dated 29th November, 1997, addressed to the respondent no.2, sought approval for the appointment of the petitioner herein. The minutes of the Selection Committee were also forwarded. It is the case of the petitioner that the office of respondent no.2 did not intimate to respondent no.4, or the School disapproving the appointment of the petitioner within three week of the receipt of the letter. However, on 22nd January, 1998, the Assistant Director of Education informed the fourth respondent that an application had been received from the fifth respondent herein, an ex-teacher of the School, claiming right to the post of Primary Teacher. The fourth respondent was requested to offer his comments. It transpires that correspondence was exchanged between the Management of the School and the office of the Second Respondent. The Management by the letter of 6th March, 1998, conveyed to the office of the second respondent that the services of the fifth respondent had been terminated with effect from 3rd March, 1992, in term of the letter of appointment issued to her at the time of initial appointment. The appointment letter issued to respondent no.5 was dated 30th June, 1989. The office of respondent no.2 was also informed that the question of her absorption in the School did not and cannot arise. By communication dated 6th March, 1998, the office of respondent no.2 was informed that the appointment of the petitioner has been done after complying with all necessary legal formalities. Respondent no.5 had

not applied for the post and under these circumstances, the appointment of the petitioner be approved.

3. The third respondent, however, vide communication dated 13th April, 1998, addressed to the fourth respondent, informed the fourth respondent that the petitioner was surplus consequent to the short-fall of enrolment and with the increase in enrolment, one additional post had been sanctioned for the School. Under these circumstances, respondent no.5 had to be absorbed against the said post as the 'No Objection' was given by the office of the second respondent, directing the Management to prefer surplus/retrenched teachers. Their attention was also invited to the fact that there were Court directives for absorption of surplus staff of teachers against available vacancies and, as such, the proposal for approval of appointment could not be considered.

Respondent no.4 by further communication of 8th July, 1998, informed the office of the second respondent that the services of respondent no.5 had been terminated in accordance with the terms and conditions and, at the relevant time, the School was not an aided school and when the first respondent had sanctioned salary and aid for the School, respondent no.5 was not in employment and, as such, she was neither a surplus teacher, nor on the list of surplus teachers. It was further pointed out that the selection for

the newly created post had been done in terms of the sanction granted by the office of the second respondent. As there was no response from the office of the second respondent, the petitioner made a detailed representation on 16th November, 1998. There was a communication on 13th April, 1998, by the third respondent setting out that respondent no.5 had to be absorbed against the additional post sanctioned to the School for the Academic Year 1997-1998 and, consequently, the approval for appointment of the petitioner could not be considered, as it was unjust and illegal and arbitrary. It is on account of this that the petitioner has filed the present petition.

4. Though notice has been served on respondent no.5, respondent no.5 is not represented before this Court. On behalf of respondent nos. 1 to 3 an affidavit has been filed by respondent no.1. The reply is in the context of the communication addressed by the office to respondent nos. 2 and 4. It is pointed out that considering the provisions of the School Education Act, 1984, and the Rules made thereunder, the Management of aided Schools in terms of Rule 76 of the Education Rules is the appointing authority for teaching and non-teaching employees. The Management while making appointment was duty-bound to follow the proper procedure as laid down in the Rules as also instructions issued by the office of the second respondent from time-to-time, in order to claim admissible salary and other

grants and on failure to comply with the procedure of recruitment would render them liable to make payment out their own funds. It is the specific case of respondent no.2 that the appointment of the petitioner as Primary Teacher was not considered favourably as respondent no.4 had not followed the directions given in letter dated 21st August, 1997. It is specifically set out that the Management was informed that permission was granted to fill up the post sanctioned by following the usual procedure of direct recruitment and by giving preference to the surplus retrenched teachers. Insofar as the contention of the petitioner that there was a deemed sanction, it s contended that the Management did not apply in terms of the Rules as set out therein and, as such, it cannot be said that there was deemed sanction. The further contention of respondent no.2 is that respondent no.2 has acted on the complaint received from respondent no.4 dated 22nd January, 1998. It is in these circumstances that respondent no.2 did not grant sanction for appointment of the petitioner as in the opinion of respondent no.2 it was respondent no.5 who was eligible to be appointed to the post of Primary Teacher in the new post sanctioned for the School.

5. At the hearing of the petition, on behalf of the petitioner it is contended that the sole reason given by respondent no.2 for not granting permission to the petitioner is that respondent no.5 being a Primary Teacher who had been declared surplus had to be first absorbed and/or re-employed.

It is submitted, that would only arise in the event the predicates of Rule 34(4) of the Education Rules being satisfied. In the instant case that was not the case as respondent no.5 was not in service at the time the post was sanctioned. The services of respondent no.5 had been terminated much earlier to release of salary grants for Primary Teachers in the School. Respondent no.5 was not employed in any other School pursuant to her termination. Respondent no.5 herself had not challenged her termination and in these circumstances, the only ground given does not subsist and consequently the failure to grant approval would be arbitrary.

6. It is not necessary for us to deal with the other contentions including the contention raised by the petitioner about deemed sanction. In the first instance, if the letter of 21st August, 1998, is perused, the office of the second respondent had permitted the Management of the School to fill in the new vacancy by direct recruitment. At the time of recruitment, the only consideration was that if there are surplus/retrenched teachers they should be given preference. In other words, if amongst the direct recruits there were also applicants who had been declared surplus/retrenched, they would be given preference over fresh applicants. In the instant case, from the material on record, there were no surplus/retrenched teachers. In other words, in the field of choice therefore, were all others who

had applied, amongst them the petitioner, for consideration. The selection therefore by the Management of respondent no.4 was in terms of letter dated 21st August, 1997.

Secondly, even considering the alternate contention that respondent no.5 had to be absorb ed, the question still would be whether respondent no.5 met the requirements of Rule 34 (4) of the Education Rules. For that purpose firstly, an employee had to become surplus. For that purpose the employee had to be a permanent teacher. We proceed on the footing, without admitting the contention that the employee had become surplus as it is the contention of respondent no.4 that her services were terminated in terms of the letter of appointment. Such surplus employee, however, in terms of Rule 34(4) had to be first absorbed in the first instance in such aided School as the Director of Education ought to specify. Respondent no.5 did not, for the period between 1992 and 1998 seek her remedy with the office of respondent no.2 on the ground that she was surplus and had to be absorbed. Respondent no.1 was, therefore, not in employment. The second requirement is that if vacancy arises thereafter after an employee is declared surplus, within a period of three years the teacher rendered surplus shall be absorbed in the former School, but if such re-absorption does not take place, within the period of three years, the services of the teacher declared surplus would be continued in the School where she had been absorbed. That is also not the position

here. Further, a teacher on temporary basis or working on probation shall not qualify for absorption. In other words, it is only a permanent teacher who had been rendered surplus who was entitled to absorption. Respondent no.2 did not address itself to these aspects of the matter. There is no material produced to show that the respondent no.5 was permanent. On the contrary, the stand of respondent no.4, which has not been challenged is that the appointment of respondent no.5 was temporary.

In these circumstances, the decision communicated to the Management of the School and/or respondent no.4 by respondent no.2 refusing to grant sanction to the appointment of the petitioner is clearly arbitrary and/or contrary to Rule 34 and the provisions of the Education Act and Rules. In the light of that the petition is entitled to succeed.

On behalf of respondents no.4 learned advocate points out that the petitioner has been teaching in the School continuously though her salary has not been paid consequent on respondent no.2 not releasing the salary grants. In the light of that the following Order:-

7. Petition made absolute in terms of prayer clause (a). Respondent no.2 is further directed to release the salary grants of the petitioner herein on respondent no.4 submitting the relevant papers to the office of respondent

no.2, and within a period of eight weeks thereafter.

In the circumstances of the case there shall be no order as to costs.

F. I. REBELLO, J.

P. V. HARDAS, J.

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